

1 STEPHEN S. WALTERS (BAR NO. 54746)  
MARK J. SEIFERT (BAR NO. 217054)  
2 ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP  
3 Three Embarcadero Center, 12th Floor  
San Francisco, CA 94111-4074  
4 Phone: (415) 837-1515  
Fax: (415) 837-1516  
5 E-Mail: swalters@allenmatkins.com  
mseifert@allenmatkins.com

6 Attorneys for Defendants  
7 DUX INTERIORS, INC. and  
BO GUSTAFSSON  
8

9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA

11 SAN FRANCISCO DIVISION

12 JOHNSON DESIGN ASSOCIATES, INC., a  
California corporation, and SHARYN  
13 JOHNSON, an individual,

14 Plaintiffs,

15 v.

16 DUX INTERIORS, INC., a New York  
corporation, and BO GUSTAFSSON, an  
17 individual,

18 Defendants.

Case No. C07-05754 MMC

DEFENDANTS' REPLY IN SUPPORT OF  
MOTION TO DISMISS COMPLAINT

Date: January 18, 2008  
Time: 9:00 a.m.  
Place: 450 Golden Gate Avenue  
San Francisco, California  
Courtroom 7  
Judge: Hon. Maxine M. Chesney

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
I. INTRODUCTION.....	1
II. ARGUMENT .....	1
A. Legal Standards Applicable to a Motion to Dismiss .....	1
B. Johnson Fails to State a Claim for Breach of Contract Based on the Termination Because It Admits Both Breach and Failure to Cure .....	2
1. The Termination Issue Can Be Decided on a Motion to Dismiss Because the Relevant Facts Are Undisputed.....	3
2. Johnson Has Not Established That Its Breach Was Immaterial .....	4
3. Johnson's Breach Was Incurable, and Johnson Concedes Making No Effort to Cure .....	5
4. Johnson's Reliance on Another Advertisement Omitting the Trademark Registration Symbol Is a Red Herring.....	6
C. Johnson's Opposition Confirms That the Other Assertions of Breach of Contract, and Unfair Competition, Must Be Dismissed as Impermissibly Vague and Conclusory .....	7
D. Johnson Concedes That Dismissal of Its Conversion Claim Is Proper .....	10
E. Johnson Does Not State a Claim for Intentional Infliction of Emotional Distress Because It Fails to Allege Facts Showing Extreme and Outrageous Conduct.....	10
F. Johnson Concedes That Dismissal of Its Unjust Enrichment Claim Is Proper .....	12
G. Johnson Does Not State a Claim Under Cal. Bus. & Prof. Code § 17200 Because It Has Identified No Improper Conduct on the Part of Dux.....	12
H. Johnson Concedes That It Is Not Currently Seeking a Preliminary Injunction, and Johnson Cannot Meet the Standards for an Injunction in Any Event .....	14
III. CONCLUSION .....	14

**TABLE OF AUTHORITIES****Page(s)****Cases**

<i>Alcorn v. Anbro Eng'g, Inc.</i> , 86 Cal. Rptr. 88 (Cal. 1970) .....	11
<i>Allied Grape Growers v. Bronco Wine Co.</i> , 249 Cal. Rptr. 872 (Cal. Ct. App. 1988) .....	13, 14
<i>Balistreri v. Pacifica Police Dep't</i> , 901 F.2d 696 (9th Cir. 1990) .....	2
<i>Bell Atlantic Corp. v. Twombly</i> , 127 S. Ct. 1955 (2007) .....	2, 12
<i>Cel-Tech Comm., Inc. v. Los Angeles Cellular Tel. Co.</i> , 83 Cal. Rptr. 2d 548 (Cal. 1999) .....	13
<i>Cochran v. Cochran</i> , 76 Cal. Rptr. 2d 540 (Cal. Ct. App. 1998) .....	10, 12
<i>Desaigoudar v. Meyercord</i> , 223 F.3d 1020 (9th Cir. 2000) .....	9
<i>Foley v. Interactive Data Corp.</i> , 254 Cal. Rptr. 211 (1988) .....	11
<i>Hewlett-Packard Co. v. Intergraph Corp.</i> No. C 03-2517 MJJ, 2003 WL 23884794 (N.D. Cal. Sept. 6, 2003) .....	9
<i>Independent Ass'n of Mailbox Center Owners, Inc. v. Superior Court</i> , 34 Cal. Rptr. 3d 659 (Cal. Ct. App. 2005) .....	11
<i>Jones v. Cmty. Redevelopment Agency</i> 733 F.2d 646 (9th Cir. 1984) .....	9
<i>Kern Oil &amp; Refining Co. v. Tenneco Oil Co.</i> , 792 F.2d 1380 (9th Cir. 1986) .....	3
<i>McHenry v. Renne</i> , 84 F.3d 1172 (9th Cir. 1996) .....	9
<i>Orion Tire Corp. v. Goodyear Tire &amp; Rubber Co., Inc.</i> , 268 F.3d 1133 (9th Cir. 2001) .....	2
<i>Orkin Exterminating Co. v. FTC</i> , 849 F.2d 1354 (11th Cir. 1988) .....	13, 14
<i>Pareto v. FDIC</i> , 139 F.3d 696 (9th Cir. 1998) .....	2, 12
<i>Pino v. Ryan</i> , 49 F.3d 51 (2d Cir. 1995) .....	2

	<u>Page(s)</u>
1	
2 <i>Romaneck v. Deutsche Asset Mgmt.,</i>	
3       No. C05-2473 TEH, 2005 WL 2171987 (N.D. Cal. Sept. 6, 2005).....	12
4 <i>Schneider v. Cal. Dept. of Corrections,</i>	
5       151 F.3d 1194 (9th Cir. 1998).....	6
6 <i>Schneider v. TRW, Inc.,</i>	
7       938 F.2d 986 (9th Cir. 1991).....	10, 12
8 <i>Superior Motels, Inc. v. Rinn Motor Hotels, Inc.,</i>	
9       241 Cal. Rptr. 487 (Cal. Ct. App. 1987) .....	4
10 <i>Thinket Ink Information Resources, Inc. v. Sun Microsystems, Inc.,</i>	
11       368 F.3d 1053 (9th Cir. 2004).....	2
12 <i>Vess v. Ciba-Geigy Corp USA,</i>	
13       317 F.3d 1097 (9th Cir. 2003).....	9
14 <i>Wallis v. Superior Court,</i>	
15       207 Cal. Rptr. 123 (Cal. Ct. App. 1984) .....	11
16 <i>Weinstein v. Saturn Corp.,</i>	
17       No. C-07-0348 MMC, 2007 WL 1342604, *1-*2 (N.D. Cal. May 8, 2007) .....	3, 10
18 <b><u>Statutes</u></b>	
19 15 U.S.C. § 1111 .....	5
20 Cal. Bus. & Prof. Code § 17200.....	12
21 <b><u>Rules</u></b>	
22 Fed. R. Civ. P. 12(b)(6).....	1, 2, 8
23 Fed. R. Civ. P. 12(e).....	1, 9
24 Fed. R. Civ. P. 15(a).....	2
25 Fed. R. Civ. P. 8(a).....	1, 8
26 Fed. R. Civ. P. 9(b).....	1
27	
28	

## 1 **I. INTRODUCTION**

2 The opposition brief ("Opposition") filed by Johnson<sup>1</sup> is remarkable for what it does *not*  
 3 dispute. It expressly concedes that dismissal of the conversion and unjust enrichment claims is  
 4 proper. Opposition at 13. It also concedes (as it must) that Johnson is not currently requesting a  
 5 preliminary injunction. Opposition at 9. It expressly concedes (as does the Complaint) that  
 6 Johnson failed to use the trademark registration symbol, which was one of the independent bases  
 7 for the termination of the License Agreement. Opposition at 2, 5-6; Complaint ¶ 14. Of equal  
 8 importance, the Opposition expressly concedes that, despite the assertion that the breach was  
 9 minor and easily curable, Johnson has not made any effort to cure the breach. Opposition at 6.  
 10 And, although it does not concede this point expressly, the Opposition does not dispute that the  
 11 improper advertisement was never submitted to Dux for approval, which is a second—and  
 12 independent—breach of the License Agreement that was identified in the termination notice.

13 These concessions and omissions bar recovery on each of Johnson's claims to the extent  
 14 they are based on the termination of the License Agreement. Additionally, the Opposition  
 15 effectively confirms that dismissal of Johnson's remaining claims is proper given the lack of legal  
 16 support for Johnson's arguments and the absence of any suggestion that Johnson can plead  
 17 additional facts to support those claims. Under these circumstances, the Motion should be  
 18 granted, without leave to amend.

## 19 **II. ARGUMENT**

### 20 **A. Legal Standards Applicable to a Motion to Dismiss**

21 The Motion sets forth the legal standards under Federal Rules of Civil Procedure 8(a),  
 22 9(b), 12(b)(6) and 12(e) that apply to this case (Motion at 9-10), and Johnson does not seriously  
 23 contest these requirements. Instead, Johnson asserts only that motions to dismiss are "disfavored"  
 24 and that pleadings play a "lesser role" in federal practice. Opposition at 3-4. Johnson cannot  
 25

---

26 <sup>1</sup> This reply will use the same defined terms that appear in the motion to dismiss ("Motion").  
 27 Thus, the term "Johnson" will be used interchangeably to refer to Johnson Design Associates,  
 28 Inc., Ms. Johnson, or both, unless otherwise indicated. The term "Dux" will be used  
 interchangeably to refer to Dux Interiors, Inc., Mr. Gustafsson, or both. The term "License  
 Agreement" will be used to refer to the license agreement between the parties, a copy of which  
 appears as Exhibit A to the Gustafsson Declaration that was filed with the Motion.

1 change the reality, however, that Rule 12(b)(6) requires dismissal where there is a “lack of a  
 2 cognizable legal theory *or the absence of sufficient facts alleged under a cognizable legal theory.*”  
 3 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990) (emphasis added). Johnson  
 4 also cannot wave away the fact that courts need not accept conclusory allegations or unwarranted  
 5 inferences as true. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965-66 (2007) (noting that  
 6 “labels and conclusions, and a formulaic recitation of the elements of a cause of action will not  
 7 do”); *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998) (“[C]onclusory allegations of law and  
 8 unwarranted inferences are not sufficient to defeat a motion to dismiss.”). Nor can Johnson  
 9 dispute that dismissal is proper if a defense appears on the face of the complaint, i.e., if the  
 10 plaintiff pleads itself out of court. *Pino v. Ryan*, 49 F.3d 51, 53 (2d Cir. 1995). These are the  
 11 governing principles that control this Motion.

12 Similarly, although Johnson insists that there is a “liberal policy regarding amendment,” it  
 13 concedes that denial of leave to amend is proper if amendment would be futile. Opposition at 3-5;  
 14 *see also* Fed. R. Civ. P. 15(a); *Thinket Ink Information Resources, Inc. v. Sun Microsystems, Inc.*,  
 15 368 F.3d 1053, 1061 (9th Cir. 2004) (leave to amend properly denied where amendment would be  
 16 futile). In addition, a party's failure to indicate additional facts that could be alleged to save a  
 17 claim counsels in favor of denying leave to amend. *Orion Tire Corp. v. Goodyear Tire & Rubber*  
 18 *Co., Inc.*, 268 F.3d 1133, 1137 (9th Cir. 2001). Again, these are the controlling principles for this  
 19 Motion, and Johnson does not dispute them.

20 **B. Johnson Fails to State a Claim for Breach of Contract Based on the**  
 21 **Termination Because It Admits Both Breach and Failure to Cure.**

22 As discussed in the Motion, the License Agreement contains numerous provisions intended  
 23 to carefully govern Johnson's use of Dux's intellectual property. Motion at 3-5, 10-11. Among  
 24 these provisions are Sections 3.3 and 8.3, which unequivocally require the use of the trademark  
 25 registration symbol (“®”), and require that Johnson obtain Dux's prior approval before issuing any  
 26 advertisements. License Agreement §§ 3.3, 8.3. Johnson concededly failed to comply with these  
 27 requirements before sending its postcard advertisement to an untold number of customers on its  
 28

1 mailing list. Johnson concedes in its Complaint that it failed to use the trademark registration  
2 symbol. Complaint ¶ 14. Johnson also concedes this point in its Opposition. Opposition at 5-6.

3 Johnson now goes a step further, and concedes that it has not attempted to cure this breach,  
4 let alone to cure it within the 30 days following the October 12, 2007 notice of the breach.  
5 Opposition at 6. Johnson also does not and cannot dispute the fact that the October 12, 2007  
6 notice cited, as an independent basis for termination, Johnson's failure to obtain prior approval of  
7 the advertisement, a failure which is likewise incurable. Motion at 5 & n.6; Opposition at 5-6.  
8 These admitted facts entitled Dux to terminate the License Agreement under the plain terms of  
9 that contract. License Agreement § 15.2(a) (permitting termination where a party is "in default of  
10 any of its obligations hereunder and shall have failed to correct or cure such default within thirty  
11 (30) calendar days after having received written notice of such default" (emphasis added)). In  
12 response, Johnson makes four assertions: (1) that the termination issue cannot be decided on a  
13 motion to dismiss because it "goes to the merits of this case;" (2) that Johnson's breach of the  
14 License Agreement was immaterial and cannot support termination; (3) that the License  
15 Agreement requires an opportunity to cure and does not mention an "incurable" breach; and (4)  
16 that Dux itself has issued an advertisement that omitted the trademark registration symbol.  
17 Opposition at 5-6. None of these arguments has any merit.

18 **1. The Termination Issue Can Be Decided on a Motion to Dismiss Because**  
19 **the Relevant Facts Are Undisputed.**

20 The termination issue most assuredly can be decided on a motion to dismiss because the  
21 pertinent facts are not disputed and the issue turns solely on a question of contract interpretation.  
22 Dux demonstrated in the Motion that the interpretation of a contract is a question of law, and that a  
23 court may interpret a contract in deciding a motion to dismiss. Motion at 10 (citing *Kern Oil &*  
24 *Refining Co. v. Tenneco Oil Co.*, 792 F.2d 1380, 1383 (9th Cir. 1986), and *Weinstein v. Saturn*  
25 *Corp.*, No. C-07-0348 MMC, 2007 WL 1342604, \*1-\*2 (N.D. Cal. May 8, 2007)). Johnson has  
26 cited no authority to contradict these cases. Instead, Johnson offers the bare assertion that the  
27 issue should not be decided on a motion to dismiss because it "goes to the merits of this case."  
28 Opposition at 5. Of course it does, but that is what Rule 12(b)(6) is all about. Where, as here, a

1 plaintiff cannot allege facts, as opposed to conclusions, showing even a colorable claim for relief,  
 2 those issues should be decided promptly so the parties can avoid wasting resources on unnecessary  
 3 and costly discovery.

## 4                   2.       Johnson Has Not Established That Its Breach Was Immaterial.

5           Johnson's argument that the breach was immaterial, and did not justify termination, is  
 6 similarly unavailing. Johnson relies exclusively on *Superior Motels, Inc. v. Rinn Motor Hotels,*  
 7 *Inc.*, 241 Cal. Rptr. 487, 495-96 (Cal. Ct. App. 1987), for the proposition that not every breach of  
 8 a contract justifies termination. Opposition at 6. But while Johnson quotes extensively from  
 9 *Superior Motels*, it omits the actual *holding* of that case, which was that the breach at issue there  
 10 was material. *Superior Motels*, 241 Cal. Rptr. at 498. That holding actually supports this Motion.

11           *Superior Motels* involved an anti-assignment provision in a lease agreement stating that the  
 12 appointment of a receiver to take possession of the lessee's assets would constitute a breach. *Id.* at  
 13 489.<sup>2</sup> The lease agreement also contained a provision requiring cure within 15 days of notice of  
 14 default, and stated that if the lessee failed to cure, the lessor could reenter the premises following a  
 15 specified notice period. *Id.* at 489-90. Subsequently, a receiver was appointed to take possession  
 16 of the lessee's assets. *Id.* at 490. The lessor provided notice of the default, but the default was not  
 17 cured. *Id.* at 490-91. After waiting for the additional notice period to run, the lessor attempted to  
 18 regain possession and filed suit accordingly. *Id.* at 491. The trial court held that the breach of the  
 19 anti-assignment provision was material. *Id.* at 492-93. The Court of Appeal affirmed, noting the  
 20 importance of the anti-assignment provision and the interests of the lessor that it was intended to  
 21 protect. *Id.* at 496-98.

22           So here, the detailed provisions of the License Agreement governing Johnson's use of  
 23 Dux's intellectual property protect Dux's vital interests. This is, after all, a *License Agreement*  
 24 which gives Johnson a carefully circumscribed right to use Dux's most valuable asset—a brand  
 25 and a reputation for quality that have been built up over decades. As discussed more fully in the  
 26 Motion, the License Agreement as a whole, and the provisions governing the use of Dux's

28 <sup>2</sup> The breach issues in the *Superior Motels* case involved additional parties besides the original  
 lessor and lessee, but the distinction is unimportant for present purposes.



1 registered trademarks and requiring prior approval of advertisements in particular, are essential to  
 2 protecting Dux's trademarks and good will, and to giving Dux the broadest possible remedies in  
 3 the event of infringement. *See* Motion at 3-5, 10-11; License Agreement § 8.3 (imposing  
 4 requirements concerning use of registered Dux trademarks and prior approval of advertisements  
 5 "[i]n order to control the way in which the Trademarks, including the registered 'Duxiana' and  
 6 'Dux' trademarks, are used, and in order to ensure the uniformity and quality of advertising of  
 7 Duxiana Products"); 15 U.S.C. § 1111 (requiring trademark registrant to give notice of registration  
 8 with "®" symbol, or words "Registered in U.S. Patent and Trademark Office" or "Reg. U.S. Pat. &  
 9 Tm. Off.", in order to recover profits and damages, unless infringer had actual notice of  
 10 registration). These provisions constitute several pages of the License Agreement, and are  
 11 remarkable for their breadth and detail. License Agreement §§ 1.13, 2.1, 3.1-3.6, 8.3-8.5. They  
 12 state clearly, unequivocally, and repeatedly that the DUX and DUXIANA registered trademarks  
 13 must be accompanied with the trademark registration ("®") symbol, and that Johnson must obtain  
 14 Dux's approval before issuing any advertisements. License Agreement §§ 3.2-3.3, 8.3-8.5.

15 Johnson's attempts to brush off an admitted and uncured breach of provisions that, on their  
 16 face, go to the heart of the parties' agreement and are designed and essential to protect the valuable  
 17 good will of the licensor's business must fail as a matter of law.

### 18 **3. Johnson's Breach Was Incurable, and Johnson Concedes Making No** 19 **Effort to Cure.**

20 Johnson's argument that the License Agreement does not provide for termination based on  
 21 an "incurable" breach also is without merit. Opposition at 5. As stated in the Motion, the  
 22 incurable nature of Johnson's breach obviated the cure provision in the License Agreement.  
 23 Motion at 11; *see also* 15 Williston on Contracts (4th ed.) § 45:23 (discussing Uniform  
 24 Commercial Code provision concerning breach of installment contracts and noting that "[t]he  
 25 statutory requirement that the seller be afforded an opportunity to cure the defect in the installment  
 26 is, of course, inapplicable where the defect is of such a nature that it is incapable of being cured").  
 27 Johnson has not even addressed—much less refuted—this argument.

At any rate, even if Johnson were entitled to a 30-day cure period, it was indisputably put on notice of its breach by Dux's October 12, 2007 letter, and now concedes that it has made no effort to cure that breach during the ensuing three months. Opposition at 6. Although Johnson attributes its failure to attempt to cure to Dux's insistence that the breach is incurable, that argument rings hollow: If Johnson really disagreed with Dux's position, it would have said so during the cure period and approached Dux with a proposed course of action. *See* 15 Williston on Contracts (4th ed.) § 45:23 (discussing Uniform Commercial Code provision concerning breach of installment contracts and noting that "it is incumbent upon the seller to assure the buyer that a cure will be forthcoming" and that the "right to cure is not designed to allow the seller to have a never-ending series of chances to bring the goods into conformity with the contract; nor is it designed to force the buyer to accept a nonconforming product as satisfaction of the contract"). Instead, Johnson did nothing, and even now does not allege anything in its Complaint or Opposition as to how a cure might be accomplished.<sup>3</sup> That is fatal to Johnson's argument.

#### 4. Johnson's Reliance on Another Advertisement Omitting the Trademark Registration Symbol Is a Red Herring.

Johnson also asserts that Dux has mailed marketing materials without the trademark registration symbol, and attaches a copy of an advertisement to the Opposition. Opposition at 6 & Exhibit B. As an initial matter, this document is not referenced in the Complaint and therefore cannot be considered in deciding the Motion. *Schneider v. Cal. Dept. of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) ("In determining the propriety of a Rule 12(b)(6) dismissal, a court *may not* look beyond the complaint to a plaintiff's ... memorandum in opposition to a defendant's motion to dismiss." (emphasis in original)). Additionally, the document has not been authenticated by an affidavit or declaration, so it is not properly before the Court. *See* Local Rule 7-5(a). In all events, the argument is a red herring.

The advertisement cited by Johnson was printed in 2005 by Quintess, which is a Dux marketing partner, not by Dux. Supplemental Declaration of Bo Gustafsson in Support of

<sup>3</sup> This admitted fact also refutes Johnson's assertion that the breach should be ignored because it was an "innocent mistake." Opposition at 6.

Defendant's Motion to Dismiss ¶ 2 (filed concurrently herewith). When the advertisement was received, reviewed and approved by Dux before it was printed by Quintess, Dux specifically instructed Quintess to include the "®" symbol. *Id.* Moreover, the Quintess advertisement was not a general mailing, but was restricted to a discrete group of persons who had already purchased Dux beds. *Id.* Johnson offers no authority to support its untenable assertion that an error made by a Dux marketing partner contrary to specific instructions somehow relieves Johnson of its obligations to comply with the plain terms of the License Agreement. Johnson also does not, because it cannot, allege that it somehow relied on—or even knew about—the Quintess advertisement when Johnson omitted the "®" symbol and failed to obtain approval of the advertisement at issue in this case. Dux's dealings with Quintess with respect to the Quintess advertisement have nothing to do with Johnson.

\* \* \*

Johnson's admissions confirm that the termination of the License Agreement was proper, and cannot support Johnson's claim for breach of contract, or any other claim.

**C. Johnson's Opposition Confirms That the Other Assertions of Breach of Contract, and Unfair Competition, Must Be Dismissed as Impermissibly Vague and Conclusory.**

The Motion addresses Johnson's laundry list of other alleged breaches of contract and unfair competition, and demonstrates that those claims should be dismissed for being impermissibly vague and conclusory. Motion at 12-14. In response, Johnson asserts—in terms that are as conclusory as the Complaint itself—that these alleged breaches are sufficient to state a claim. Opposition at 7-9. In fact, Johnson generally just repeats or paraphrases the insufficient allegations of the Complaint (and sometimes does even less than that), and offers no indication of any additional relevant information pertaining to the challenged allegations. Opposition at 7-8.

For example, the Motion takes issue with paragraphs 20 and 33(c) of the Complaint, which allege that Dux failed to honor warranty and other reimbursement requirements. Motion at 12. Specifically, the Motion argues that paragraphs 20 and 33(c) are impermissibly vague in light of the parties' 16-year course of dealing and that, for all Dux knows, this purported breach was waived long ago or is time barred. Motion at 12. In its Opposition, Johnson merely restates the

1 conclusory assertions in these paragraphs of the Complaint, claims that Dux has not reimbursed  
 2 Johnson for expenses submitted "in the past," and asserts that Johnson has had to pay a *de minimis*  
 3 fee for warehousing "warranty replacements." Opposition at 7. This does nothing to clarify what  
 4 warranty claims are at issue, what other reimbursements are at issue, or when any of this allegedly  
 5 improper conduct took place.

6 Johnson's other assertions are similarly ineffective. The Motion challenges paragraph  
 7 33(d) of the Complaint, which states that Dux failed to advertise properly and required Johnson to  
 8 waste money on "ineffectual" advertising. Motion at 12. Johnson's only response is the  
 9 following: "This claim refers to Dux failing to provide effective advertising and continuing to  
 10 place ineffective advertising in the fact [sic] of complaints regarding same." Opposition at 7.  
 11 Johnson's Opposition says even less about this allegation than the Complaint, and does not  
 12 respond to the points made in the Motion. Once again, there is nothing to inform Dux or the Court  
 13 as to what Johnson is talking about or when it supposedly occurred.

14 The Motion challenges paragraphs 21 and 33(e) of the Complaint, which allege that Dux  
 15 has offered prices, discounts and incentives to other distributors but not to Johnson. Motion at 12.  
 16 In response, Johnson simply states, "This claim is self explanatory." Opposition at 7. But the  
 17 claim is hardly self-explanatory because it does not identify the circumstances of these offers,  
 18 when during the past 16 years they occurred, how this breached the License Agreement, or  
 19 anything else that would allow Dux to frame a responsive pleading.

20 The Motion challenges paragraph 33(f) of the Complaint, which alleges that Dux has  
 21 diverted Johnson's customer orders to itself and others. Motion at 12. The Opposition states,  
 22 "This claim refers to Dux selling goods directly to a customer of plaintiffs in breach of the  
 23 agreement." Opposition at 7-8. Again, this just reiterates what is in the Complaint and does  
 24 nothing to respond to the Motion; we still are left to wonder—what goods, what customer, on  
 25 what date, and what provision of the License Agreement supposedly is at issue?

26 Johnson's vague and conclusory assertions of breach of contract are subject to dismissal for  
 27 the reasons stated and based on the authorities in the Motion.<sup>4</sup> See Fed. R. Civ. P. 8(a), 12(b)(6),  
 28

---

<sup>4</sup> To the extent Johnson adds additional information in the Opposition, it is nonetheless still

12(e); *Jones v. Cmty. Redevelopment Agency*, 733 F.2d 646, 649-50 (9th Cir. 1984); *Hewlett-Packard Co. v. Intergraph Corp.*, No. C 03-2517 MJJ, 2003 WL 23884794, at \*1 (N.D. Cal. Sept. 6, 2003); *McHenry v. Renne*, 84 F.3d 1172, 1179 (9th Cir. 1996). Moreover, the Opposition does not even pretend to address the fact that paragraph 33(c) of the Complaint, which asserts that Dux engaged in a "scheme to defraud plaintiffs," must be alleged with particularity. Motion at 12-13; Fed. R. Civ. P. 9(b); *Vess v. Ciba-Geigy Corp USA*, 317 F.3d 1097, 1103-04, 1105-06 (9th Cir. 2003); *Desaigoudar v. Meyercord*, 223 F.3d 1020, 1022-23 (9th Cir. 2000). Those claims must be dismissed for that reason as well.

Johnson's unfair competition allegations also must be dismissed as impermissibly conclusory. Motion at 13-14. Notably, Johnson says nothing in response to Dux's argument that paragraph 35 of the Complaint should be dismissed because the California Franchise Relations Act does not apply to these parties. Opposition at 8-9. Instead, Johnson relies only on paragraph 34, which asserts that Dux failed to provide Johnson with prices, discounts and incentives offered to other licensees, and that this constituted unfair competition and antitrust violations. Opposition at 8. Once again, however, Johnson offers no factual information to support this allegation, and merely goes on to discuss a limited number of legal authorities concerning price discrimination. Opposition at 8-9. But even assuming that Johnson has correctly stated the law of price discrimination, which Dux does not concede, each of the authorities it cites for the elements of such claims requires an allegation that the discrimination tended to destroy competition. Opposition at 8-9. Johnson has not alleged any facts whatsoever suggesting any injury to

---

insufficient to state a claim. For example, the Motion challenges paragraph 33(h) of the Complaint, which alleges that Dux has interfered with relations with Johnson's employees. Motion at 12. In response, Johnson states that this refers to Dux sending its termination notice by fax to Johnson's shop with knowledge that it would be seen by Johnson's employees, who would then have concern about the future of their employment. Opposition at 8. Even if this information were part of the Complaint, it would not support a breach of contract claim because Johnson does not identify any provision in the contract prohibiting Dux from sending faxes to Johnson's shop, or requiring Dux to send communications to some other location. In fact, the License Agreement expressly *permits* communications by fax. License Agreement ¶ 17. The Motion also challenges paragraphs 19 and 33(b) of the Complaint, which allege that Dux manufactured defective merchandise. Motion at 12. Johnson responds that this refers to bedding materials that were subject to a recall having to do with flammability. Opposition at 7. Yet this does not suggest a breach of the contract, because any products that were recalled and replaced would have been cured under the License Agreement, and would not support a claim for breach.

1 competition.<sup>5</sup> Johnson's unfair competition and antitrust allegations are conclusory in the extreme  
2 and must be dismissed.

3 **D. Johnson Concedes That Dismissal of Its Conversion Claim Is Proper.**

4 Johnson concedes that dismissal of its conversion claim is proper. Opposition at 13.  
5 Accordingly, the conversion claim must be dismissed.

6 **E. Johnson Does Not State a Claim for Intentional Infliction of Emotional**  
7 **Distress Because It Fails to Allege Facts Showing Extreme and Outrageous**  
8 **Conduct.**

9 As stated more fully in the Motion, a claim for intentional infliction of emotional distress  
10 requires, among other things, a showing of extreme and outrageous conduct by the defendant.  
11 Motion at 15-16 (citing *Cochran v. Cochran*, 76 Cal. Rptr. 2d 540, 543 (Cal. Ct. App. 1998)). The  
12 Motion also shows that California imposes a demanding standard for showing that conduct is  
13 sufficiently extreme and outrageous to be actionable. Motion at 15. The Motion goes on to  
14 discuss cases concerning threats that have been found to be non-actionable which are far more  
15 outrageous than anything found in the Complaint. Motion at 15-16 (citing *Cochran*, 76 Cal. Rptr.  
16 2d at 546-47 (death threat not actionable, even combined with other threats), and *Schneider v.*  
17 *TRW, Inc.*, 938 F.2d 986, 992-93 (9th Cir. 1991) ("*Schneider*") (conduct of supervisor who had  
18 screamed, yelled and made threatening gestures while criticizing plaintiff's job performance not  
19 actionable)).

20 In response, Johnson attempts to cobble together an argument based on dated, inapposite  
21 case law involving employment relationships and the incorrect notion that Ms. Johnson's  
22 relationship with Dux is "akin" to an employment relationship. Neither assertion has merit. Ms.  
23 Johnson does not claim to be, is not, and never has been a Dux employee. Nor is Johnson, or Ms.  
24 Johnson as an individual, a franchisee. *See* Motion at 13-14 (explaining why California Franchise  
25 Relations Act does not apply to Dux and Johnson). These facts, which are undisputed, foreclose  
26 Johnson's attempt to save the emotional distress claim. Indeed, the case that Johnson quotes

---

27 <sup>5</sup> Additionally, as noted in the Motion, to the extent that Johnson alleges on information and  
28 belief that different prices were offered to different distributors and that this violated the  
common law and various statutes (potentially including fraud) (Complaint ¶ 21), Johnson  
needed to allege the basis for such information and belief. Motion at 13 n.8 (citing *Weinstein*,  
No. C-07-0348 MMC, 2007 WL 1342604, \*1 n.1).



1 concerning franchise agreements is not an emotional distress case at all, but instead is an  
2 arbitration case that compares franchise agreements to employment agreements in the course of  
3 discussing adhesion contracts. *Independent Ass'n of Mailbox Center Owners, Inc. v. Superior*  
4 *Court*, 34 Cal. Rptr. 3d 659, 408-10 (Cal. Ct. App. 2005). It has nothing to do with emotional  
5 distress.

6 Johnson's citation of case law concerning employment relationships is similarly misplaced.  
7 See Opposition at 11-12 (citing *Alcorn v. Ambro Eng'g, Inc.*, 86 Cal. Rptr. 88 (Cal. 1970), and  
8 *Wallis v. Superior Court*, 207 Cal. Rptr. 123 (Cal. Ct. App. 1984)). As noted above, Ms. Johnson  
9 is not a Dux employee. As Johnson concedes (Opposition at 11), these cases rely heavily on the  
10 plaintiff's status as an employee, which involves a relationship that generally is at-will and  
11 involves a high degree of vulnerability, as opposed to a negotiated License Agreement between  
12 two business entities. These cases are readily distinguishable from this one.

13 *Alcorn*, for example, involved an employee who was subjected to horribly abusive racial  
14 slurs in the course of being wrongfully terminated. *Alcorn*, 86 Cal. Rptr. 88 at 89. The  
15 "aggravated circumstances" involving this language factored heavily into the court's holding. *Id.*  
16 at 90-91 & n.4-5. Johnson alleges nothing of the sort here.

17 *Wallis*, which has since been overruled on other grounds, *Foley v. Interactive Data Corp.*,  
18 254 Cal. Rptr. 211 (1988), involved an employee who, as known by the defendant, was in an  
19 "extremely vulnerable position" given the facts that he had worked at the defendant's furniture  
20 plant for over 30 years; he was told he would be laid off prior to becoming eligible for pension  
21 benefits; he entered into an agreement for a monthly stipend for ten years in exchange for not  
22 competing with the defendant's business and refrained from taking on new employment; he had no  
23 other work skills; and the defendant made a misrepresentation to the plaintiff in the course of  
24 terminating the stipend without warning after only three years. *Wallis*, 207 Cal. Rptr. at 125, 127,  
25 129-30. Again, Johnson has alleged nothing similar in this case. The Opposition (not the  
26 Complaint) states only that Ms. Johnson is 62 years old and that the business "contributes to Ms.  
27 Johnson's livelihood." Opposition at 10, 12. Johnson does not allege that Ms. Johnson is  
28 destitute, has no transferable work skills, or has no other means of support—or that Dux knew any

1 of those things. In fact, Ms. Johnson is a sophisticated party who runs her own business. *Wallis* is  
 2 not on point. See *Romaneck v. Deutsche Asset Mgmt.*, No. C05-2473 TEH, 2005 WL 2171987, \*5  
 3 (N.D. Cal. Sept. 6, 2005) (distinguishing *Wallis* based on plaintiff's vulnerability and employer's  
 4 knowledge of that vulnerability).

5 Even setting aside the fact that Ms. Johnson is an independent business owner, not a Dux  
 6 employee, the emotional distress claim would still fail. Although an employment relationship can  
 7 be a *factor* in showing that a plaintiff is particularly vulnerable to the defendant's conduct, "major  
 8 outrage is still essential to the tort; and the mere fact that the actor knows that the other will regard  
 9 the conduct as insulting, or will have his feelings hurt, is not enough." *Cochran*, 76 Cal. Rptr. 2d  
 10 at 544-45 (internal quotation marks and citations omitted). Indeed, as noted in the Motion, the  
 11 *Schneider* case, in which the court affirmed summary judgment for the defendant, involved threats  
 12 made during an employment relationship. *Schneider*, 938 F.2d at 992-93.

13 In short, Johnson's conclusory allegations that Dux "threatened" and "harassed" Ms.  
 14 Johnson on a number of occasions, and that this was extreme and outrageous, fail to state a claim.  
 15 Motion at 15-16; *Twombly*, 127 S. Ct. at 1965-66 (noting that "labels and conclusions, and a  
 16 formulaic recitation of the elements of a cause of action will not do"); *Pareto*, 139 F.3d at 699;  
 17 *Cochran*, 76 Cal. Rptr. at 543, 545-47; *Schneider*, 938 F.2d at 992-93. The claim must be  
 18 dismissed.

19 **F. Johnson Concedes That Dismissal of Its Unjust Enrichment Claim Is Proper.**

20 Johnson concedes that dismissal of its unjust enrichment claim is proper. Opposition at 13.  
 21 Accordingly, the unjust enrichment claim must be dismissed.

22 **G. Johnson Does Not State a Claim Under Cal. Bus. & Prof. Code § 17200**  
 23 **Because It Has Identified No Improper Conduct on the Part of Dux.**

24 As stated in the Motion, Johnson's Section 17200 claim fails because it is premised on  
 25 Dux's termination of the License Agreement. Motion at 17. In support of the Section 17200  
 26 claim, the Complaint alleges only that the "scheme to terminate the instant franchise and *defraud*  
 27 Plaintiffs out of their valuable property and convert it to their own accounts or those of their  
 28 associates" violates Section 17200. Complaint ¶ 50 (emphasis added). In its Opposition, Johnson



1 now asserts that this claim also relies on the allegation in paragraph 15 of the Complaint, which  
 2 asserts that Dux has engaged in a "similar pattern across the country in recent years of terminating  
 3 Dux distributor/franchisees and converting their business for their own accounts." Complaint ¶  
 4 15. But again, because the termination of the License Agreement was not improper, it cannot  
 5 support the Section 17200 claim. Moreover, paragraph 50 of the Complaint relies on an allegation  
 6 of fraud. As a result, Johnson was required to plead with particularity, which it has not done.

7 Even if the supposed so-called "scheme" of terminating licensee agreements alleged by  
 8 Johnson were true, moreover, it still would not give rise to liability under Section 17200. Section  
 9 17200 requires a determination that the practice at issue "offends an established public policy or ...  
 10 is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Cel-*  
 11 *Tech Comm., Inc. v. Los Angeles Cellular Tel. Co.*, 83 Cal. Rptr. 2d 548, 564 (Cal. 1999) (internal  
 12 quotation marks and citations omitted). A mere breach of contract, without more, does not meet  
 13 this standard.

14 The cases that Johnson cites are not to the contrary. Opposition at 12-13. *Orkin*  
 15 *Exterminating Co. v. FTC*, 849 F.2d 1354 (11th Cir. 1988), which is not binding in any event,  
 16 involved an affirmance of the FTC's determination that Orkin violated section 5 of the Federal  
 17 Trade Commission Act, 15 U.S.C. § 45, where Orkin's breach of over 200,000 consumer contracts  
 18 for pest extermination services resulted in an "extraordinary level of consumer injury." *Orkin*, 849  
 19 F.2d at 1367-68.<sup>6</sup> Johnson's other case, *Allied Grape Growers v. Bronco Wine Co.*, 249 Cal. Rptr.  
 20 872 (Cal. Ct. App. 1988), involved a bulk purchaser of grapes who had a practice of  
 21 systematically assigning an artificially low quality grade to the grapes it purchased from the  
 22 plaintiff. *Id.* at 874-75. The trial court held that this practice was unfair under Section 17200  
 23 because it was fraudulent and violated sections of the California Food and Agricultural Code. *Id.*  
 24 at 883. The Court of Appeal affirmed and held that, even assuming the practice was not  
 25 fraudulent, it was nonetheless "unfair" as an "unconscionable" effort by a purchaser that had

26  
 27  
 28 <sup>6</sup> The passage that Johnson attributes to the court in *Orkin* (Opposition at 12-13) is actually not  
 the court's statement, but rather is a section from a law review article that is merely "noted" by  
 the court. *Orkin*, 849 F.2d at 1367.

1 "overcontracted for the purchase of grapes in a year that was marked by a glut of grapes on the  
2 market." *Id.* at 884.

3 Johnson alleges no breach on the scale at issue in *Orkin* or systematic unconscionability of  
4 the sort at issue in *Allied*. This claim must be dismissed as well.

5 **H. Johnson Concedes That It Is Not Currently Seeking a Preliminary Injunction,**  
6 **and Johnson Cannot Meet the Standards for an Injunction in Any Event.**

7 Johnson concedes that it has not yet moved for injunctive relief. Opposition at 9. Thus,  
8 there is presently no request for a preliminary injunction before the Court. If Johnson  
9 subsequently moves for a preliminary injunction, Dux will respond at the appropriate time. At any  
10 rate, Johnson will not be entitled to an injunction because each of its substantive claims for relief  
11 must be dismissed and for the additional reasons stated in the Motion. Motion at 18.

12 **III. CONCLUSION**

13 Dux's motion to dismiss should be granted. The claims for conversion and unjust  
14 enrichment should be dismissed without leave to amend given Johnson's concession that dismissal  
15 of such claims is appropriate. The remaining claims should also be dismissed without leave to  
16 amend because amendment would be futile, and Johnson, as the Opposition makes plain, does not  
17 so much as suggest that it has additional facts that might save its claims.

18  
19 Dated: January 4, 2008

Respectfully submitted

20 ALLEN MATKINS LECK GAMBLE  
21 MALLORY & NATSIS LLP  
22 STEPHEN S. WALTERS  
MARK J. SEIFERT

23 By:                     /s/                    

24 STEPHEN S. WALTERS  
25 Attorneys for Defendants  
26 DUX INTERIORS, INC. and  
27 BO GUSTAFSSON  
28